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No. 97-1587

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NANCY KIMBALL KRIPPENE, INDIVIDUALLY, AND AS THE EXECUTRIX OF THE ESTATE OF URBAN M. KRIPPENE, DECEASED,
Petitioner,

v.

BOARD OF COMMISSIONERS OF CHATHAM COUNTY, GEORGIA and CHATHAM COUNTY, GEORGIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Are there compelling reasons for granting a writ of certiorari when the automobile accident involving Mr. Krippene and a Chatham County Police officer driving to work does not constitute a constitutional deprivation that could subject Respondents to liability under 42 U.S.C. § 1983?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	9
THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO COMPELLING REASONS FOR GRANTING A WRIT WHEN THE AUTOMOBILE ACCIDENT INVOLVING MR. KRIPPENE AND A CHATHAM COUNTY POLICE OFFICER DRIVING TO WORK DOES NOT CONSTITUTE A CONSTITUTIONAL DEPRIVATION THAT COULD SUBJECT RESPONDENTS TO LIABILITY UNDER 42 U.S.C. § 1983	9
CONCLUSION	17
APPENDIX A	
Deposition of Al St. Lawrence, p. 11, 15, 52-53	1a
APPENDIX B	
Deposition of Major William R. Freeman, p. 11, 43-45	4a
APPENDIX C	
Deposition of Sheriff Al St. Lawrence, Exhibit 6	7a
APPENDIX D	
Affidavit of Ronald Lowe, Sr.	10a
APPENDIX E	
Deposition of Ronald Lowe, Sr., p. 38-40, 115-116	15a
APPENDIX F	
Deposition of Neal Owens, p. 21-23, 12-16	18a

TABLE OF AUTHORITIES

CASES Page

Almand v. DeKalb County, Georgia, 103 F. 3d 1510 (11th Cir. 1997) 8
Anderson v. City of Glenwood, Ga., 893 F. Supp. 1086 (S.D. Ga. 1995) 11, 13
Banks v. Patton, 210 Ga. App. 62, 435 S.E. 2d 68 (1993) 10
Board of County Commissioners of Bryan County, Oklahoma v. Brown, 520 U.S. ——, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997) 11, 13
Cannon v. Taylor, 782 F. 2d 947 (11th Cir. 1986) .. 10, 11
Canton v. Harris, 489 U.S. 378, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989) 12, 13, 14, 17
City of Los Angeles v. Heller, 475 U.S. 796, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986) 11
City of St. Louis v. Praprotnik, 485 U.S. 112, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988) 8
Collins v. Harker Heights, 503 U.S. 115, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992) 10, 12, 16, 17
County of Sacramento v. Lewis, S. Ct. No. 96-1337 (1997 WL 770156) 12
DeShaney v. Winnebago Social Services, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989) 16
Estate of Story Through McNair v. McDuffie County, 929 F. Supp. 1523 (S.D. Ga. 1996) 11
Lewis v. Sacramento County, 98 F. 3d 434 (9th Cir. 1996) 11, 12
Linder v. Richmond County, Georgia, 844 F. Supp. 764 (S.D. Ga. 1994) 11
Lovins v. Lee, 53 F. 3d 1208 (11th Cir. 1995) 16
Lyle v. Dodd, 857 F. Supp. 958 (N.D. Ga. 1994) 11
Nishiyama v. Dickson County, Tennessee, 814 F. 2d 277 (6th Cir. 1987) 16
Roach v. City of Fredericktown, Mo., 882 F. 2d 294 (8th Cir. 1989) 10, 11
Rock v. Lowe, 893 F. Supp. 1573 (S.D. Ga. 1995) .. 11
Rooney v. Watson, 101 F. 3d 1378 (11th Cir. 1996) .. 10, 11
Sewell v. Town of Lake Hamilton, 117 F. 3d 488 (11th Cir. 1997) 12

Page

TABLE OF AUTHORITIES—Continued

Vineyard v. County of Murray, Georgia, 990 F. 2d 1207 (11th Cir. 1993) 11

STATUTES

42 U.S.C. § 1983 ..... i, iii, 8, 9, 10
O.C.G.A. § 35-8-8 13
O.C.G.A. § 35-8-9 13
O.C.G.A. § 35-8-10 13
O.C.G.A. § 35-8-21 13
O.C.G.A. § 40-6-6 ..... 14, 11a

U.S. CONSTITUTION

14th Amendment 17

RULES

U.S. Supreme Court Rule 10 9

OTHER AUTHORITIES

Chatham County Police Department Standard Operating Procedure ("S.O.P.") # 10-016 ..... 14, 11a
Chatham County Police Department S.O.P. # 10-040 ..... 1, 2, 5, 6, 14, 11a, 12a

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On November 18, 1994, Chatham County ("County") Police Officer Bryan D. Smith was driving his police vehicle to work and collided with Petitioner's husband, Urban M. Krippene, who subsequently died. Smith was not on a high-speed pursuit or emergency call. The County terminated Smith after its investigation concluded that Smith had exceeded the posted speed limit and violated County Police Department Standard Operating Pro-

cedure ("S.O.P.") #10-040 which requires officers to drive safely and obey traffic laws except when in actual pursuit or emergency.

There is no evidence of any constitutionally offensive conduct by Smith or *any* County police officers. The following incidents of poor judgment, negligence and failure to follow departmental policy on the part of Smith involve *performance* related problems and not constitutional deprivations against *any* citizens.

On April 13, 1991, Bryan D. Smith was hired to work at the Chatham County Police Department as a patrol officer. Chief St. Lawrence and Major Freeman were not aware of Smith's unacceptable performance evaluation during his previous employment at the Sheriff's Department. (App. A, St. Lawrence depo., p. 11, 15; App. B, Freeman depo., p. 11; Petitioner's App. E) Nowhere in the March 19, 1991 performance evaluation does it state that Smith had violated the constitutional rights of any citizens. (*Id.*; App. C, St. Lawrence depo., Exh. 6)

In 1991, Chief St. Lawrence was notified that Officer Smith was deficient in his work performance due to an inability to follow instructions and complete reports. Smith was counseled and advised that he would be terminated if significant improvements were not made. In July, 1991, Smith's ex-girlfriend made a complaint to the Police Department of a sexual assault by Smith. Internal Affairs reported this complaint to Chief St. Lawrence. The ex-girlfriend decided not to prosecute. Major Freeman decided to transfer Smith to a different watch to be evaluated by another supervisor after reviewing a memo from Smith's superiors stating there was no significant improvement in Smith's performance.

On August 14, 1991, Major Freeman recommended that Smith's take home privileges be revoked for 3 days because he was in an accident in his police vehicle when

he turned into the path of a vehicle. No injuries were reported. Major Freeman also recommended more severe disciplinary action if further accidents of this type occurred.

On January 29, 1992, Major Freeman was informed that Smith had been in an accident while responding to a Code 3 call. No injuries were reported. No further action was necessary because there was no violation of departmental rules or policy. On February 7, 1992, Smith completed a course entitled "Basic Emergency Vehicle Operations."

On April 20, 1992, Smith was involved in an accident in his police car while responding to a "Code 2—Urgent—Proceed as Soon as Possible" call. Smith struck another vehicle in the rear. No injuries were reported. Major Freeman instructed Sgt. Nichols to cite Smith for following too close. The County's accident investigation concluded that Smith was traveling faster than he had indicated and that he had caused the accident. On April 23, 1992, Major Freeman recommended that Smith's take home privileges be revoked for 14 days and more severe disciplinary action if future incidents of this type occurred.

On May 13, 1992, Major Freeman recommended that Smith's take home privileges be revoked for 30 days because of two incidents of speeding within a 45 minute span on May 12, 1992 in which he was clocked at 30 miles per hour over the posted speed limit. Smith did not have *any* accident as a result of these incidents. On May 22, 1992, Major Freeman recommended that Smith's take home privileges be revoked for an additional 2 weeks because he was scheduled for military leave during the 30 day period. Major Freeman also recommended that Smith be terminated if he had any more accidents because he believed that the County was dealing with a negligent retention problem.

In January 1993, Major Freeman received a memo from Captain Lowery reporting that Smith damaged his vehicle after driving into an area which had flooded. Major Freeman received a supplemental memo from Captain Lowery reporting that there was no serious damage to the vehicle. Sgt. Thomas had advised all the officers assigned to the flooded areas to use caution. Smith had not initially been truthful about the incident. Major Freeman agreed with Captain Lowery's recommendation to revoke Smith's take home privileges for 180 days because Smith had a history of bad driving habits, he was cautioned about going into high water, there was evidence that his vehicle had been driven into deep water, and he was untruthful about the incident.

On February 14, 1993, Smith was given an oral reprimand for effecting a traffic stop on his way to a dispatched call.

In early June, 1993, Major Freeman was informed that Smith was seen in the company of a female at the Forest City Gun Club with his gun belt off while on duty after he failed to respond to a radio call to assist another officer. After an Internal Affairs investigation was conducted, Major Freeman met with Smith and Smith's supervisors to discuss the incident. He advised Smith that he should have answered the radio call and that he should not have been in a secluded area with his gun belt off. Major Freeman gave him a written reprimand, approved by Chief Davin.

On August 9, 1993, Major Freeman met with Smith and his supervisors about a problem with Smith being unfamiliar with his division and the location of businesses. Smith was advised to improve his knowledge of locations and response time and that any recurrence of these infractions would result in disciplinary action.

On September 26, 1993, Smith's police vehicle was hit in a parking lot while he was in a restaurant. In January,

1994, Smith's police vehicle was backed into at the drive thru of a restaurant. There was no disposition of these incidents.

During the time that Al St. Lawrence was Chief of Police, he followed Major Freeman's recommendations regarding disciplinary action against Smith. During the time that Major Davin was Chief of Police, he followed Major Freeman's recommendations regarding disciplinary action against Smith.

On November 18, 1994, Smith was involved in an automobile accident in his police vehicle on his way to work. (App. D, Aff. Lowe, ¶ 5) Chief Lowe was informed that the accident was serious and that the driver of the other vehicle had been taken to the hospital. (*Id.*) He requested an Internal Affairs investigation because of the seriousness of the accident. (*Id.*)

During the course of the invesigation, Chief Lowe was informed that the other driver, Mr. Krippene, died and that the City of Savannah was charging Smith with speeding and homicide in the second degree. (App. D, Aff. Lowe, ¶ 6) On November 29, 1994, Chief Lowe suspended Smith without pay pending the outcome of the Internal Affairs investigation. (*Id.*, ¶ 7) Chief Lowe decided to suspend Smith because of the seriousness of the accident and the seriousness of the charges against him. (*Id.*) He did not believe that it was in the best interest and general welfare of the County and its citizens to allow Smith to continue working during the investigation. (*Id.*) He referred Smith to a psychologist to assist him in dealing with the stress of the accident and to determine his fitness for duty to ensure the safety of the citizens of the County. (*Id.*)

The Internal Affairs investigation concluded that Smith had exceeded the posted speed limit and had violated S.O.P. #10-040 which requires the driver of any police

vehicle to operate the vehicle in a reasonable and safe manner and to comply with the motor vehicle laws and traffic regulations. (App. D, Aff. Lowe, ¶ 8)

Chief Lowe reviewed the disciplinary actions in Smith's personnel file which showed that Smith had a history of speeding, automobile accidents, incidents involving poor judgment and failure to follow departmental policy. (App. D, Aff. Lowe, ¶ 9) Chief Lowe decided to terminate Smith because he believed that Smith was a liability to the County and to the citizens of the County. (*Id.*, ¶ 10) On January 12, 1995, Chief Lowe notified Smith of his termination. (Petitioner's App. D) Smith was acquitted of the vehicular homicide charge. The charge of driving too fast for conditions was dismissed.

The County did not officially sanction its police officers to violate the law or to inflict constitutional injuries on *any* citizens. Chief Lowe testified that in his opinion, prior to Mr. Krippene's death, there was evidence in Smith's file that would demonstrate a pattern of a habitual violation that "*could*" endanger the citizens of Chatham County. (Petitioner's App. H, Lowe depo., p. 37) Chief Lowe also testified that he would not have terminated Smith if Smith's personnel file had been brought to his attention prior to Mr. Krippene's death. (App. E, Lowe depo., p. 38) He would have investigated further to see if there had been a consistency of discipline given to Smith. (*Id.*, p. 39-40) A consistency of discipline was given to Smith and he was appropriately terminated after a series of progressive disciplinary actions. Chief Lowe did not *ever* substantiate Petitioner's suggestion of a pattern of reckless disregard of public safety on the highways and streets. When asked whether there were any officers who demonstrated a pattern of reckless disregard of public safety on the highways or the streets, such as Bryan Smith demonstrated, Chief Lowe replied, "There probably have been." (App. E, Lowe depo., p. 115) When asked about

any specific incidents, Chief Lowe could not recall any. (*Id.*, p. 115-116)

The Police Department did *not* allow its officers to violate state law. The Police Department policies require officers to follow state law when driving police vehicles. (App. D, Aff. Lowe, ¶ 3-4. Furthermore, nowhere is it stated on pages 21 and 22 of Neal Owens' deposition, or anywhere else, that it was the Police Department's policy to allow police officers, when not responding to a call, to exceed the speed limit in violation of state law. (App. F, Owens depo., p. 21-22) Corporal Owens testified that a supervisor was to be notified if a police officer was caught speeding. (*Id.*, p. 12, 23)

Cpl. Owens testified that he did not know whether it was a policy or practice not to write a speeding ticket to a police officer. (App. F, Owens depo., p. 13-14). He testified that he was advised by Lt. Hill that if he saw officers speeding, to let their supervisors know. (*Id.*, p. 12, 15-16; App. B, Freeman depo., p. 44)

Major Freeman testified that it was entirely up to the supervisor whether to issue a citation. (App. B, Freeman depo., p. 43-44). Major Freeman could have ordered that a citation be given to Smith on May 12, 1992, but he did not because he believed that the 30 days loss of take home privileges was sufficient as a form of discipline. (*Id.*, p. 44-45) Major Freeman ordered Sgt. Nichols to cite Smith for following too close after Smith's accident on April 20, 1992, in which the accident investigation concluded that Smith had been traveling faster than he had indicated.

Former Chief St. Lawrence testified that it is up to the officer on the street whether to issue a ticket to a speeding officer. (App. A, St. Lawrence depo., p. 52-53) He also testified that the officer was disciplined whether or not he received a ticket. (*Id.*, p. 53)

Petitioner's characterization of Major Freeman, or any persons below the level of Chief, as a policy maker is disputed. The *only* persons who constitute policy makers regarding the training, supervision and discipline of County Police Officers are those who served as Chief of Police when Smith was a police officer: Chief St. Lawrence, Acting Chief Davin, and Chief Lowe. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 124, 99 L. Ed. 2d 107, 118-119, 108 S. Ct. 915 (1988). Major Freeman as commander of the Patrol Division was only authorized to *recommend* disciplinary actions to the Chief. Neal Owens was certainly not a policy maker. In fact, Owens was an Advanced Police Officer when he worked for the County Police Department! (App. F, Owens depo., p. 16)

Petitioner's reliance on the testimony of Corporal Leopold to demonstrate a policy of allowing officers to violate state law is without merit because Corporal Leopold was not a policy maker. He did not have final authority on disciplining officers under his supervision. (Petitioner's App. I, Leopold depo., p. 15) Smith had only one accident when he was under Cpl. Leopold's supervision and therefore Cpl. Leopold could not testify about whether consistency of discipline was imposed. (*Id.*, p. 14)

Petitioner never named Bryan Smith as a defendant. Counsel for Petitioner acknowledged during oral argument before the Court of Appeals that Smith's conduct did not constitute a constitutional deprivation. Respondents deny that Smith was acting in a manner directly related to the performance of police duties when the accident occurred. He did not have authority to violate the law. He was terminated after the accident. Since Smith was not acting under color of state law when the accident occurred, Petitioner's Section 1983 claim fails. *Almand v. DeKalb County, Georgia*, 103 F. 3d 1510, 1513-1514 (11th Cir. 1997). The accident could have happened if

Smith had been driving his family car to work. Causation is questionable because Mr. Krippene pulled out in front of Smith who had the right of way. Corporal Simpkins, an accident reconstructionist, testified that if Smith had been traveling the speed limit, the accident could have been avoided *or* the damage to Mr. Krippene's car would have been less severe, clearly showing that the accident still could have happened.

REASONS FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO COMPELLING REASONS FOR GRANTING A WRIT WHEN THE AUTOMOBILE ACCIDENT INVOLVING MR. KRIPPENE AND A CHATHAM COUNTY POLICE OFFICER DRIVING TO WORK DOES NOT CONSTITUTE A CONSTITUTIONAL DEPRIVATION THAT COULD SUBJECT RESPONDENTS TO LIABILITY UNDER 42 U.S.C. § 1983.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10. There is no compelling reason for granting the writ because the law is clear that an automobile accident involving a police officer merely driving his vehicle to work and a citizen who is injured does not constitute a constitutional deprivation. There is no split in any of the circuits regarding municipal liability in the case of an automobile accident between a citizen and police officer not involving a high-speed pursuit or an emergency. Petitioner is simply trying to circumvent the County's sovereign immunity by inappropriately attempting to convert a state law tort claim into a constitutional claim. Allowing Petitioner to accomplish this goal would defeat the sovereign immunity of local governments and create a cause of action against local governments not intended under Section 1983.

The proper analysis of a Section 1983 claim against a local government requires the following determination: (1) whether the alleged harm to a plaintiff was caused by a constitutional violation and, (2) if so, whether the local government or municipality was responsible for the violation. *Collins v. Harker Heights,* 503 U.S. 115, 120, 117 L. Ed. 2d 261, 270, 112 S. Ct. 1061 (1992).[1] Petitioner has failed to establish that the alleged harm to Mr. Krippene was caused by a constitutional violation.

Before a local government can be liable under 42 U.S.C. § 1983, there must be a constitutional deprivation and no constitutional deprivation is present in this case. "[A] person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no section 1983 cause of action for violation of a federal right." *Rooney v. Watson,* 101 F. 3d 1378, 1381 (11th Cir. 1996) (citing *Cannon v. Taylor,* 782 F. 2d 947, 950 (11th Cir. 1986)). Even if Smith's driving over the speed limit in the absence of an emergency or police pursuit constitutes gross negligence, it does not transform a state negligence claim into a constitutional violation. *Id. See also Banks v. Patton,* 210 Ga. App. 62, 63, 435 S.E. 2d 68, 70 (1993) (42 U.S.C. § 1983 is not intended to circumvent sovereign immunity in negligence cases).

Petitioner's claim that the County is liable under 42 U.S.C. § 1983 for maintaining a policy of failing to adequately train police officers to drive safely and allowing a pattern of reckless driving by its police officers is without merit because there is no constitutional deprivation. "[A]n inquiry into a governmental entity's custom or policy is relevant *only* where a constitutional deprivation has occurred." *Rooney, supra* (citing *Roach v. City of Fred-*

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[1] Petitioner's statement that *Collins* involves a high-speed police pursuit is incorrect. *Collins* involves a municipal employee who died after entering a manhole to stop a sewer line.

ericktown, Mo., 882 F. 2d 294, 297-298 (8th Cir. 1989)) (emphasis added). *See also Vineyard v. County of Murray, Georgia*, 990 F. 2d 1207, 1211 (11th Cir. 1993).

The law in the Eleventh Circuit and this Court is clear that "no policy, practice, custom or usage can act to violate one's rights where no underlying constitutional deprivation has been shown." *Estate of Story Through McNair v. McDuffie County*, 929 F. Supp. 1523, 1528 (S.D. Ga. 1996), aff'd, 110 F. 3d 798 (11th Cir. 1997), (citing *Linder v. Richmond County, Georgia*, 844 F. Supp. 764, 768-69 (S.D. Ga. 1994), aff'd, 38 F. 3d 574 (11th Cir. 1994)); *Rock v. Lowe*, 893 F. Supp. 1573, 1583 (S.D. Ga. 1995) and *Lyle v. Dodd*, 857 F. Supp. 958, 967 (N.D. Ga. 1994). *See also City of Los Angeles v. Heller*, 475 U.S. 796, 799, 89 L.Ed.2d 806, 106 S. Ct. 1571 (1986). "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* [unconstitutional conduct] is quite beside the point." *Heller*, 475 U.S. at 799, 89 L. Ed. 2d at 811. (emphasis added by the Court).

Petitioner's reliance on Division 3 of *Cannon* is completely misplaced. *Rooney* and *Vineyard* were decided after *Cannon* and therefore control. *City of Los Angeles v. Heller* was decided two months after *Cannon*. In *Rooney*, the Court of Appeals effectively rejected the analysis in *Cannon* of municipal liability since there was no underlying constitutional deprivation. *Rooney, supra.* Furthermore, *Cannon's* analysis of municipal liability for failure to train is based on a standard of gross negligence which has been rejected by this Court. *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. ——, 137 L. Ed. 2d 626, 641, 117 S. Ct. 1382 (1997); *Anderson v. City of Glenwood, Ga.*, 893 F. Supp. 1086, 1088 (S.D. Ga. 1995).

Petitioner's reliance on *Lewis v. Sacramento County*, 98 F. 3d 434 (9th Cir. 1996), is without merit because

the Court of Appeals focused on the standard of liability for *officers* in the context of high-speed vehicular pursuits, not local government liability. *Id.* at 439, 441. The "broad spectrum" in the circuits referred to in note 5 deals with labels given by courts to the standard of conduct of *officers* in cases involving an underlying constitutional violation, not a simple automobile accident. *Id.* at 441 n. 5. The appeal before this Court in *Lewis* involves the standard of conduct with respect to the *officer's* entitlement to qualified immunity. *County of Sacramento v. Lewis*, S. Ct. No. 96-1337 (1997 WL 770156). Petitioner did not sue Bryan Smith in the instant case which does not involve a high-speed pursuit.

A simple automobile accident involving an officer driving to work can be distinguished from a high-speed pursuit or emergency because it is plainly obvious that the officer, or anyone else, should obey the traffic laws when driving to work. When the "proper response is plainly obvious to all without training or supervision", there is no municipal liability for failure to train. *Sewell v. Town of Lake Hamilton*, 117 F. 3d 488, 490 (11th Cir. 1997).

Petitioner's reliance on *Canton v. Harris*, 489 U.S. 378, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989), is misplaced because a constitutional deprivation must occur *before* deciding whether the County had a custom or policy of inadequate training. In *Canton*, the Court assumed that there was a constitutional deprivation and concluded that "if a city *employee* violates another's *constitutional rights*, the city *may* be liable if it had a policy or custom of failing to train its employees and that failure caused the constitutional violation." *Id.* at 388-389 n.8, 392, 103 L. Ed. 2d at 426-427, 428 (emphasis added). *Collins, supra*, 503 U.S. at 122-123, 117 L. Ed. 2d at 272 (direct quote found in *Collins*). Furthermore, a municipality's failure to train was addressed in *Canton* in the context of a person who was allegedly denied medical treatment while in police *custody*. *Canton*, 489 U.S. at 381-382, 103

L. Ed. 2d at 421-422. Mr. Krippene was not in the custody of the County.

In *Brown*, 520 U.S. ——, 137 L. Ed. 2d at 636, 640-641, this Court's analysis of Bryan County's liability for hiring Deputy Burns was based on the assumption of an underlying constitutional violation by Deputy Burns of excessive use of force.

Even if an underlying constitutional deprivation is assumed, there is no evidence whatsoever that deliberate action by the County directly caused the alleged violation of Mr. Krippene's constitutional rights. *Brown*, 520 U.S. at ——, 137 L. Ed. 2d at 639; *Canton, supra*, 489 U.S. at 385, 103 L. Ed. 2d at 424. "Deliberate indifference" is a "stringent standard of fault" requiring proof that a municipal actor disregarded a known or obvious consequence of his actions. *Brown*, 520 U.S. at ——, 137 L. Ed. 2d at 643. Adherence to an inadequate training program which does not prevent constitutional violations may constitute deliberate indifference. *Id.*, 520 U.S. at ——, 137 L. Ed. 2d at 641. Showing that an officer was unsatisfactorily trained is not sufficient. *Canton*, 489 U.S. at 390-391, 103 L. Ed. 2d at 427-428.

Chatham County was not deliberately indifferent to the constitutional rights of its inhabitants in the training of its police officers. *Canton*, 489 U.S. at 392, 103 L. Ed. 2d at 428-429. The County adequately trains its police officers. *Anderson*, 893 F. Supp. at 1090. The Police Department requires its officers to be certified by the Georgia Peace Officers Standards and Training Council ("P.O.S.T.") and to take the continuing education requirements imposed by P.O.S.T. *See* O.C.G.A. §§ 35-8-8, 35-8-9, 35-8-10, and 35-8-21 (state law requirements on minimum training of peace officers). Officer Smith received his police certification from P.O.S.T. on July 10, 1990. The Basic Law Enforcement Training Course included instruction regarding motor vehicle laws and police vehicle operation. During the time that he worked in the Police

Department, Smith met the P.O.S.T. requirements for continuing education of 20 hours per year. On February 7, 1992, after he had an at fault accident on August 14, 1991 and a not at fault accident on January 29, 1992, Smith completed a course entitled "Basic Emergency Vehicle Operations" which included training on motor vehicle laws and police vehicle operation.

Before the accident with Mr. Krippene, the Police Department had in place S.O.P.'s and General Orders to be followed by all sworn officers. (App. D, Aff. Lowe, ¶ 3-4) There are S.O.P.'s entitled "Vehicle Operation" and "Emergency Vehicle Operation". (*Id.*, ¶ 3) S.O.P. # 10-040 requires officers to operate their police vehicles in a reasonable and safe manner, exercising due caution and judgment and to comply with the motor vehicle laws and traffic regulations except when in actual pursuit or responding to an emergency. S.O.P. # 10-016 sets forth the policy on emergency operation of police vehicles and specifically quotes O.C.G.A. § 40-6-6, the state law on that subject.

Petitioner's assertion that Respondents failed to reduce the risk of harm to Mr. Krippene is without merit. *Canton, supra,* 489 U.S. at 390-391, 103 L. Ed. 2d at 428. The County appropriately supervised Smith. After Smith's accident in August, 1991 and January, 1992, he received further training. No injuries were reported after his accident on April 20, 1992 and after his speeding infractions on May 13, 1992. The Police Department warned officers to exercise caution in areas with high water in January, 1993. Smith's conduct of driving into deep water on January 20, 1993 did not constitute *any* injury to any citizen and did not warrant termination. His accidents in Spanky's parking lot and Krystal's drive thru on September 26, 1993 and January 8, 1994 were not his fault and no citizens were injured.

The County did not tacitly authorize any actions on the part of Smith or any other officer. Smith was appro-

priately disciplined pursuant to Chatham County's policy of progressive discipline of its employees.

In 1991, Smith was appropriately disciplined. He demonstrated poor work performance and was warned of possible termination if no significant improvements were made. In an effort to resolve the problem, Major Freeman transferred Smith to a different watch to be evaluated by another supervisor. Smith received an oral reprimand for failing to service his police vehicle. After his first accident on August 10, 1991 in which no injuries were reported, Smith's take home privileges were revoked for three days and he was warned of more severe disciplinary action for future occurrences. In October, 1991, further counseling was provided about Smith's overall work performance.

In 1992, Smith was appropriately disciplined. His take home privileges were revoked for fourteen days after an at fault accident on April 20, 1992 in which no injuries were reported. Smith's take home privileges were revoked thirty days after he was clocked speeding twice within forty five minutes on May 12, 1992. Smith was not in *any* accident as a result of the speeding incidents.

In 1993, Smith was appropriately disciplined. His take home privileges were revoked 180 days after he drove his vehicle into deep water. There is no evidence whatsoever that anyone's constitutional rights were violated as a result of this incident or that anyone was injured. Smith was given a written reprimand for being in a secluded area with a female with his gun belt off.

Smith's work performance problems occurred primarily during his first year at the Police Department. He was counseled about his deficiencies and warned of more severe action if the problems continued. He was disciplined in the same manner for automobile accidents in which he was found to be at fault. After the accident with Mr. Krippene, Chief Lowe took the final step in the County's progressive discipline system and exercised his discretion

in suspending and terminating Smith. (App. D, Aff. Lowe, ¶ 7-10)

The County appropriately disciplined and supervised other officers of the Police Department. (App. D, Aff. Lowe, ¶ 12-16)

Petitioner's reliance on *Nishiyama v. Dickson County, Tennessee*, 814 F. 2d 277 (6th Cir. 1987), is misplaced. In *Nishiyama*, the sheriff's department authorized a convicted felon in its custody to drive a patrol car with blue lights. *Id.* at 279. The inmate beat the victim to death. *Id.* The Sheriff had a policy and practice of allowing the inmate to have unsupervised use of Dickson County patrol cars. *Id.* The Court stated that the Sheriff's conduct was outrageous. *Id.* at 283. *Nishiyama* does not apply because it preceded *DeShaney v. Winnebago Social Services*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989), and *Collins* and was not guided by those decisions. *Lovins v. Lee*, 53 F. 3d 1208, 1211 (11th Cir. 1995).[2] Furthermore, the conduct of the Chatham County Police Department was reasonable. Officer Smith was adequately trained and disciplined. He was not a criminal in the custody of Chatham County. He did not purposefully hit Mr. Krippene's vehicle nor did he commit a crime, as in *Nishiyama*. No injuries were reported regarding Smith's infractions prior to November 18, 1994. There is no evidence of any conduct which is outrageous or "shocks the conscience."

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[2] The Constitution imposes upon the government the duty to protect particular individuals in limited circumstances such as prisoners and persons involuntarily institutionalized. *DeShaney*, 489 U.S. at 198-199, 103 L. Ed. 2d at 260-261. *Lovins*, 53 F. 3d at 1210; *Collins*, 503 U.S. at 127, 117 L. Ed. 2d at 274. A government is responsible for the safety and well-being of an individual when it takes him into its custody and holds him there against his will. *Lovins, supra.* Mr. Krippene was not in the custody of the County when the accident happened. He was a member of the general citizenry on a routine trip to the Post Office. *See Lovins, supra.*

The County did not abuse its power or employ it as an instrument of oppression. *Collins*, 503 U.S. at 126, 117 L. Ed. 2d at 274. There is a presumption that the administration of government is based on a rational decision making process. *Id.* Decisions regarding training of County police officers are appropriately made by local officials rather than this Court. *Id.* at 128-129, 117 L. Ed. 2d at 275. *See also Canton, supra*, 489 U.S. at 392, 103 L. Ed. 2d at 428-29. "The Due Process Clause is not a guarantee against incorrect or ill-advised personnel decisions." *Collins, supra*, at 129, 117 L. Ed. 2d at 275.

CONCLUSION

The Eleventh Circuit Opinion and District Court Opinion correctly applied the controlling precedent of this Court and did not erroneously decide any questions of law. The petition should be denied.

Respectfully submitted,

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